

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOSEPH OSMAR HUSTED and DEPARTMENT OF JUSTICE,  
FEDERAL BUREAU OF PRISONS, U.S. PENITENTIARY, Lewisburg, PA

*Docket No. 99-1648; Submitted on the Record;  
Issued September 5, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant met his burden of proof to establish that he sustained a recurrence of disability on or after May 28, 1997 causally related to his August 9, 1995 employment injury.

On August 9, 1995 appellant, then a 42-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained pain in his neck, upper back and both knees when his left knee "collapsed" as he descended the employing establishment's steps thereby causing him to "unexpectedly [fall] down over a bank twenty to thirty yards." On the reverse side of the claim form, appellant's supervisor stated that appellant first received medical care on August 9, 1995 from the Sun Orthopaedic Group. Appellant did not stop work.

The Office of Workers' Compensation Programs accepted appellant's claim for cervical strain and bilateral knee sprains.<sup>1</sup>

On February 2, 1998 appellant filed a claim for recurrence of disability (Form CA-2a) alleging that on or after May 28, 1997 he sustained worsening pain causally related to a work-related injury sustained in June 1993. Appellant alleged that "[he had] always had some pain after the July [19]93 operation on [his] back, but it gradually worsened after the August 9, 1995 injury."

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<sup>1</sup> The record shows that appellant's position was eliminated in February 1996; that he was placed on the periodic rolls to receive compensation benefits for total disability for his April 29, 1985 employment injury (OWCP File No. 0102508); that those compensation payments were reduced based on a loss of wage-earning capacity determination; and that he ultimately elected disability retirement benefits, which he continues to receive.

To support his claim, appellant submitted progress notes dated March 17 to September 9, 1997, from a physician with the initials of "C.P.S." In the notes dated July 21, 1997, he stated that appellant's low back pain "seems to be worse." The physician also stated:

"Neck revealed old scar from his previous disc surgery performed back in 1993 from his injury that occurred from work and is now having reexacerbation. X-ray of the C-spine shows two other degenerating discs. It looks like he has a C7, T1 disc and reports from previous surgery and indicated. He has radicular symptoms to the left arm and at this time will be referred to Dr. DiSimone's who is going to evaluate both his low back and upper back, both work related."

Appellant also submitted a workers' compensation form report dated November 6 and 13, 1997, from Dr. J. Scott Martin, a Board-certified neurosurgeon, diagnosing radicular syndrome of the left lower extremity and "[herniated nucleus pulposus] L4-5." He further submitted a magnetic resonance imaging (MRI) scan report from Dr. Martin dated November 12, 1997. In his report, Dr. Martin stated, "there is a small midline disk protrusion at the L4-5 level and on the T2-weighted images, it appears subtly worse on the left than the right. Also at this level is desiccation and narrowing of the dis[c]." Additionally, appellant submitted a report, dated December 9, 1997 from Dr. Joel J. Berberich, a Board-certified anesthesiologist. In his report, Dr. Berberich noted that appellant reported constant lower back pain since 1995, occasionally associated with "left-sided sharp discomfort down [appellant's] left buttock, the outer aspect of his left leg into his ankle." He also noted that appellant complained of chronic occipital headaches and leg pain. Dr. Berberich stated that appellant "rises from a sitting position with moderate difficulty and ambulates with a left antalgic gait in a modestly flexed position." He also stated that appellant's lumbar spine was midline and slightly tender at the L4-5 interspace with paraspinous tenderness at L5-S1. Dr. Berberich further stated that the "Patrick's test was equivocally positive on the left side." Additionally, after discussing appellant's range of motion, he diagnosed lumbar disc disease with L4-5 radioculopathy, tobacco abuse and alcohol abuse. Dr. Berberich treated appellant with methyl prednisolone and lidocaine. Appellant also submitted progress notes dated November 13 to December 29, 1997.

By letter dated February 12, 1998, the Office requested additional factual and medical evidence from appellant regarding his claim. In response, appellant submitted a narrative statement dated March 8, 1998 and clarified that he alleged a recurrence of disability causally related to the August 9, 1995 employment injury. Appellant stated that he was a correction officer, responsible for providing security and safety for construction crews working within the employing establishment. He also stated that he experienced pain upon returning to work, which gradually worsened. Appellant stated that he was examined by Dr. Martin in October 1997, had an MRI and received pain therapy. He further stated that he experienced upper back and neck pain, headaches and took pain pills. Appellant also stated that he did not have lower back pain until his August 9, 1995 employment injury and he had not sustained injuries since that date.

By decision dated March 19, 1998, the Office denied appellant's claim on the grounds that the medical evidence of record was insufficient to establish that his alleged recurrence of disability commencing May 28, 1987 was causally related to his August 9, 1995 employment injury. The Office noted that the evidence of record showed that appellant sustained neck and

bilateral knee strains resulting from his August 9, 1995 employment injury. It also noted that appellant's recurrence of disability claim alleged lower back pain but the evidence of record did not indicate that he sustained a lower back condition resulting from his August 9, 1995 employment injury.

By letter dated March 31, 1998, appellant requested an oral hearing before an Office hearing representative. The hearing was held November 17, 1998. Appellant testified that, following his August 9, 1995 employment injury, he experienced back spasms and pain in his right hand. Appellant also testified that he believed he injured his lower back as a result of his August 9, 1995 employment injury. The record remained opened for 30 days.

Appellant submitted a report from Dr. Jonathan F. Hahn, an orthopedic surgeon, dated April 7, 1998. In his report, Dr. Hahn stated, "[appellant] had a severe proximal tibial fracture in 1985. He had open reduction and internal fixation." Dr. Hahn also stated that appellant's right knee had no effusion, lacked about 5 degrees of extension and had 100 to 105 degrees of flexion. Dr. Hahn noted right quadriceps atrophy. He also noted appellant had "severe problems with his spine" and took medication for his pain. Dr. Hahn stated, "I think [appellant] is capable of a semi-sedentary job where he would not be on his feet for more than one-third of the working day. He is not able to stretch his knee such as would be necessary in an altercation. Dr. Hahn is limited in squatting and kneeling." Appellant also submitted progress notes, dated February 27, 1998 from the physician with the initials "C.P.S." The physician stated:

"[Appellant] presented for assessment concerning his back evaluation. He is in a battle in determining whether his back injury is truly related to his work injury, which I do not nor did I follow him during this time, but he continues with low back pain. He has documented degenerative changes and joint changes with degenerative disease both in disc and joint, which has been documented by his workup. [Appellant] continues to walk with a cane because of his chronic back pain...Exam[ination] revealed point tenderness of the lumbosacral [sic] spine, loss of lordotic curvature, positive leg raising sign bilaterally with a lot of musculoskeletal tenderness to the lumbosacral region."

By decision dated January 14, 1999, the Office hearing representative affirmed the Office's prior decision on the grounds that appellant failed to establish that his alleged recurrence of disability was causally related to his August 9, 1995 employment injury.

The Board finds that appellant has not met his burden of proof to establish that he sustained a recurrence of disability on or after May 28, 1997 causally related to his August 9, 1995 employment injury.

The employee has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the claimed recurrence of disability is causally related to the original injury.<sup>2</sup> Such proof must include medical evidence that the claimed recurrence of

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<sup>2</sup> *Alfredo Rodriguez*, 47 ECAB 437, 441 (1996).

disability is causally related to the accepted employment injury.<sup>3</sup> As part of this burden, appellant must furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.<sup>4</sup> Whether a particular employment incident causes disability is a medical issue, which must be resolved by competent rationalized medical opinion evidence.<sup>5</sup> An award of compensation may not be made on the basis of surmise, conjecture, or speculation or on appellant's unsupported belief of causal relation.<sup>6</sup>

In the present case, the Office accepted appellant's claim for cervical strain and bilateral knee sprains sustained on August 9, 1995. Therefore, the remaining issue is whether appellant's alleged recurrence of disability on or after May 28, 1997 is causally related to his August 9, 1995 employment injury.

The evidence of record does not contain rationalized medical opinion evidence, based on a complete and accurate factual and medical history, showing that appellant's alleged recurrence of disability is causally related to his August 9, 1995 employment injury. The progress notes from the physician with the initials "C.P.S." dated July 21, 1997, stated that appellant sustained worsening back pain, degenerating discs and radicular left arm symptoms related to a work-related injury, but he did not specifically identify that injury nor explain the causal connection. The physician's statement that appellant's back condition was "work related" does not establish causal relationship because he did not provide a complete factual medical history nor was his opinion supported by sound medical reasoning. The physician's note dated February 27, 1998 did not address causal relationship, though he did note appellant experienced back pain. Dr. Martin's reports dated November 6 and 13, 1997 diagnosed radicular syndrome of the left lower extremity and "[herniated nucleus pulposus] L4-5," but he did not relate those conditions to appellant's August 9, 1995 employment injury. Appellant's MRI report dated November 12, 1997 also failed to include a rationalized medical opinion relating appellant's back condition to his August 9, 1995 employment injury. Dr. Berberich's report, dated December 9, 1997 discussed appellant's back condition and its symptoms but he did not address the issue of causation. Dr. Hahn's April 7, 1998 report, noted appellant's 1985 proximal tibial fracture and severe spinal condition but he did not relate the spinal condition to the August 9, 1995 employment injury or any other work-related injury. Appellant's testimony before an Office hearing representative on November 17, 1998 and narrative statement dated March 8, 1998 describing his condition and the factual histories of his work-related injuries is of no probative value as he is not qualified to render an opinion regarding medical issues.<sup>7</sup> Evidence submitted

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See *Buddy L. Spaulding*, 40 ECAB 1002, 1007 (1989).

<sup>6</sup> *Alfredo Rodriguez*, *supra* note 2.

<sup>7</sup> See *James A. Long*, 40 ECAB 358 (1989).

prior to appellant's May 28, 1997 alleged recurrence of disability also has no probative value with regard to his disability on or after that date.

As the Office only accepted that appellant sustained cervical strain and bilateral knee sprains resulting from the August 9, 1995 employment injury, appellant has the burden to submit rationalized medical opinion evidence, based on a complete and proper factual and medical background, establishing that his current back condition is causally related to that employment injury. As he did not submit the requisite evidence, appellant failed to meet his burden of proof.

The decision of the Office of Workers' Compensations Programs dated January 14, 1999 is affirmed.

Dated, Washington, D.C.  
September 5, 2000

George E. Rivers  
Member

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member